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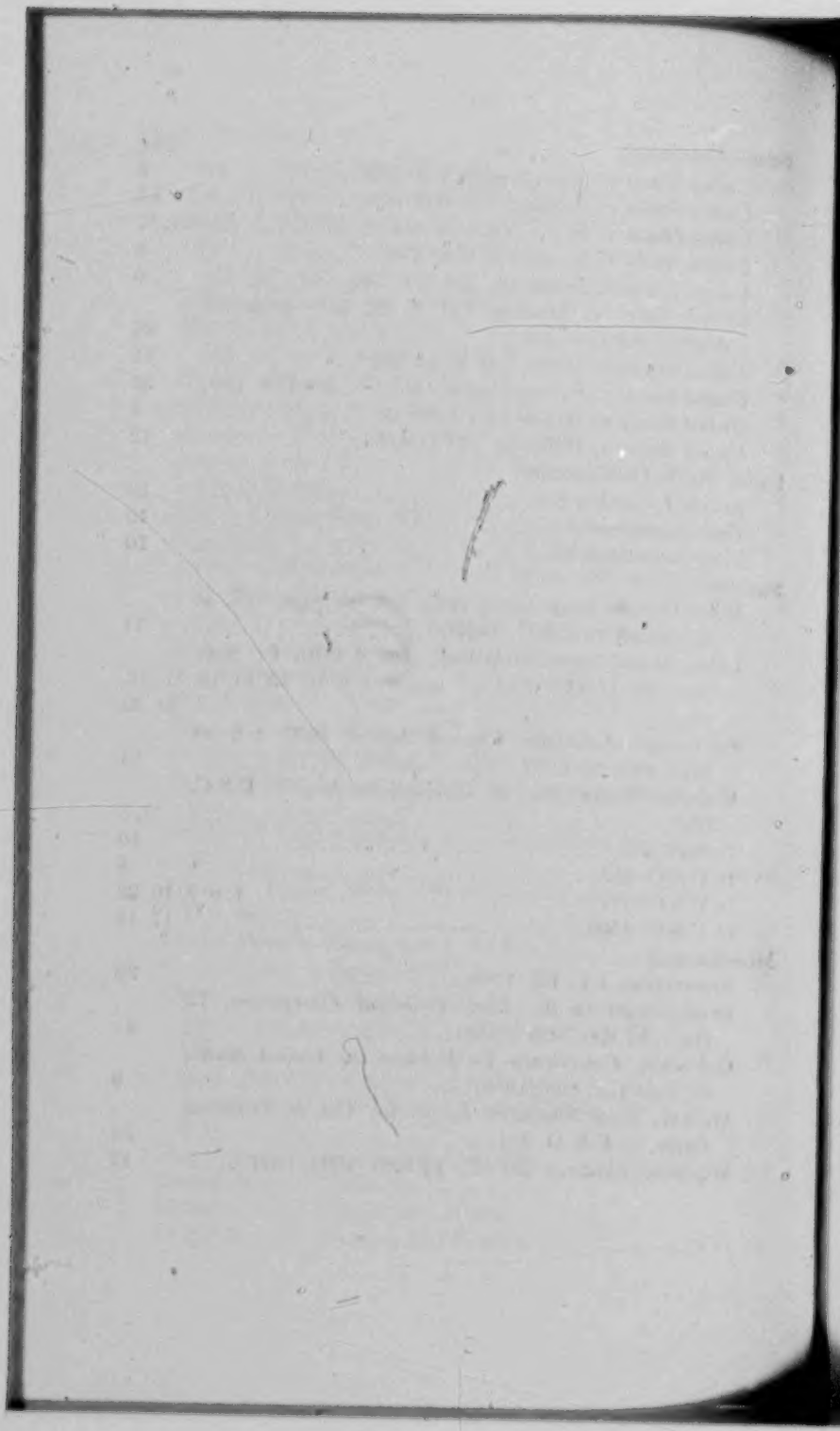

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 502

RAYMOND DENNIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1) is reported at 346 F. 2d 10. The prior opinion of the court of appeals, reversing petitioners' convictions after their first trial (Pet. App. A2) is reported at 302 F. 2d 5. The opinion of the district court sustaining the validity of the indictment (Pet. App. A3), which was affirmed by the court below on the first appeal, is reported at 160 F. Supp. 787.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 1965 (Pet. App. A). A petition and two supplementary petitions for rehearing were denied on June 28, 1965. Mr. Justice White extended the time

for filing a petition for certiorari to August 27, 1965, and the petition was filed on August 26, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant constitutional and statutory provisions are set out in Appendix B to the petition.

QUESTIONS PRESENTED

1. Whether the indictment properly charged a conspiracy to defraud the United States.

2. Whether petitioners' contention that Section 9(h) of the Labor Management Relations Act was unconstitutional constitutes a defense to the crime charged in the indictment.

3. Whether the trial court committed reversible error in (a) denying petitioners' motion for the production or inspection of grand jury minutes, (b) admitting and excluding evidence, or (c) instructing the jury.

4. Whether there was sufficient evidence to support petitioners' convictions.

STATEMENT

After a trial by jury, petitioners were convicted of conspiring, between June 15, 1949, and the date of indictment, November 16, 1956, to defraud the United States by fraudulently obtaining the services of the National Labor Relations Board for the benefit of the International Union of Mine, Mill and Smelter Workers ("Mine-Mill"). The means for accomplishing this end, according to the indictment, was the filing by

Mine-Mill officers of affidavits falsely stating that they were not members of the Communist Party. Non-Communist affidavits were, at the time, prerequisites to obtaining the Board's services under Section 9(h) of the Labor Management Relations Act, 29 U.S.C. (1958 ed.) 159(h), repealed in 1959, 73 Stat. 525.

Petitioners' motion to dismiss the indictment for failure to state an offense was denied by the trial court (Pet. App. 37a–44a). The court of appeals affirmed the denial of the motion to dismiss, but reversed the convictions because of the admission of prejudicial hearsay evidence (Pet. App. 21a–36a). Petitioners were then retried, convicted and each sentenced to three years' imprisonment and fined $2,000 (R. 40–45). The court of appeals affirmed (Pet. App. 1a–20a), rejecting petitioners' contentions that the trial court erred in refusing them access to certain grand jury minutes, in admitting and excluding certain evidence, or in instructing the jury. As it had done on the previous appeal, the court also reviewed the record and found the evidence sufficient to support the jury's verdicts.

The evidence showed that petitioners were members of the Communist Party and officers or staff members of Mine-Mill during the relevant period (R. 220, 285–287, 456, 573),[1] that Mine-Mill and the Com-

[1] Raymond Dennis was an International Representative and later a board member; Irving Dichter was also an International Representative and later a board member; Harold Sanderson was a member of the office staff and served most of the relevant period as Assistant to the President; Albert Skinner was an International Representative and Director of the Political Action Committee; Maurice Travis was Secretary-Treasurer of

munist Party opposed compliance with Section 9(h) prior to 1949 (R. 221, 232–233, 237, 245, 289–290; Govt. Ex. 2, 3(a)); that the Party and the union changed their policies of opposition in that year (R. 296, 431–434; Govt. Ex. 6); and that, after this change of position, the petitioners who were officers of Mine-Mill submitted resignations to the Party and signed non-Communist affidavits in order to obtain for Mine-Mill the services of the NLRB (R. 432, 470, 544, 557–558; Govt. Ex. 11, 13, 14, 15). This much appears to be undisputed (Pet. 5–6; Pet. App. 3a).

The evidence relating to the background of the conspiracy showed that, prior to June 1949, the Communist Party, acting through petitioners and others, played a dominant role in the affairs of Mine-Mill (*e.g.*, Travis, Dichter and Dennis, R. 81, 84–87; Wilson, R. 428, 461). For example, when a Mine-Mill board member, Kenneth Eckert, led a drive for compliance with Section 9(h) in 1948, petitioners Travis, Dennis, and Dichter, under the guidance of a Party leader who was not a member of Mine-Mill, were instrumental in having Eckert removed from union office (R. 77–79). At around the same time, all six petitioners attended Communist Party meetings, often presided over by Party officials who were not in Mine-Mill, at which various union problems were considered, particularly the threat to Communist control of Mine-Mill posed by Section 9(h) (R. 81, 84–

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the union until 1955; and Charles Wilson was an International Representative, then a board member, and later Vice-President for the Eastern States.

85, 87, 232–233, 236–238, 431–433). The fear was that, as petitioner Travis stated on a number of occasions, "it would behead the union, to sign the non-Communist affidavits under the Taft-Hartley Act" (R. 75, 87). The decision that Mine-Mill would not comply with Section 9(h) was "made in the Party" (R. 289), and petitioners acted in accordance with the Party's policy.

The reversal of the policy of noncompliance also emanated from Communist Party leadership. In the Spring of 1949, petitioner Travis informed witness William Mason that "the boys in the Party are considering changing our position" on Section 9(h) (R. 295; see also Wilson, R. 431–432, 466, 468–469). Shortly thereafter, the union's Executive Board, with petitioners Wilson and Sanderson in attendance, voted unanimously for compliance with the Act (R. 297–301). Thereupon, a rearrangement of the relationship of the Communist Mine-Mill officials to the Party was undertaken under the guidance of Party functionaries (Wilson, R. 432–433, 468–470; Dennis, R. 556–557). Petitioner Sanderson was given the job of coordinating the activities of Communists on Mine-Mill's staff, including the collection of Party dues (R. 472; see also R. 304–305). All Mine-Mill officials who were Communists, except petitioner Travis who made a public announcement of resignation (R. 306, 558), sent letters of resignation from the Party to local Party offices (*e.g.*, Wilson, R. 432, 475; Dennis, R. 556–557). As Travis subsequently admitted, his

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resignation "was recognized pretty much as a subterfuge to avoid prosecution under Taft-Hartley and most people accepted the fact that he was still in the Communist Party" (R. 558).

After the union voted to comply with Section 9(h), Communist control of its affairs, through petitioners and others, continued (*e.g.*, Skinner, R. 443–444, 446–449, 452–453; Sanderson, R. 564). The Party dictated important decisions in the union's administration, including the selection of union officers and staff members (R. 92, 441, 551–552, 555, 560) and even the employment of office workers (R. 561). As petitioner Dichter stated in 1955 to witness Gardner—whom he was investigating for the Party because of Gardner's opposition to petitioner Travis' policies—Mine-Mill was "one of the last real strongholds of the Party where the Party voice to the trade union movement could be heard" (R. 577; see also Skinner, R. 314; Travis, R. 317–318; Wilson, R. 320, 441, 562).

On several occasions after filing the affidavits called for by Section 9(h), petitioners sought and obtained for the Mine-Mill the services of the National Labor Relations Board (Skinner, Govt. Ex. 18, 19; Dennis, Govt. Ex. 20; Wilson, Govt. Ex. 21; Dichter, Govt. Ex. 22).

ARGUMENT

1. Petitioners acknowledge that "[t]he indictment explicitly charges a conspiracy to defraud the United States by fraudently obtaining for Mine-Mill the services and facilities of the National Labor Relations Board (R. 4)" (Pet. 8). Relying primarily on

Bridges v. *United States*, 346 U.S. 209, however, they contend that the indictment fails to state an offense under 18 U.S.C. 371 on the ground that the method of defrauding the United States alleged therein involves commission of another offense of which "fraud" is not an essential element (Pet. 8–11). The argument is without merit. Not only do the cases cited by petitioners fail to sustain their contention, but their position is refuted by numerous decisions in this Court and the court of appeals.

Bridges involved the Wartime Suspension of Limitations Act, 18 U.S.C. 3287, which extended the statute of limitations on a limited class of wartime frauds. Primarily on the basis of legislative history, the Court held that the Suspension Act applied "only where the fraud is of a pecuniary nature or at least of a nature concerning property" (346 U.S. at 215). Finding that the offense there charged—a conspiracy to cause the filing of false statements in a naturalization proceeding—did not involve the pecuniary or proprietary interests of the federal government (346 U.S. at 221), the Court ruled that the statute of limitations had not been suspended. An alternate ground of decision in *Bridges* was that Congress intended to extend the limitations period only for offenses of which fraud was an essential element (346 U.S. at 221). Recognizing that "fraud often accompanies" the offense there charged (346 U.S. at 222), the Court ruled that the offense might nevertheless be proved without a showing of fraud and accordingly

concluded that the limitations period was not suspended by the Act.

Nothing in *Bridges*[2] purported to affect the traditional scope of 18 U.S.C. 371. Indeed, while giving a narrow reading to the Suspension Act, the Court expressly recognized the broad reach of Section 371 and noted that cases dealing with the breadth of the conspiracy statute "do not control the interpretation of the provisions in the Wartime Suspension of Limitations Act discussed in this opinion" (346 U.S. at 221, n. 19). It follows that cases dealing with the meaning of the Suspension Act do not control the scope of 18 U.S.C. 371.

Section 371 proscribes conspiracies to defraud the United States "in any manner or for any purpose * * *." It is well settled that this offense is not limited to attempts to obtain monetary benefits from the government. *Haas* v. *Henkel*, 216 U.S. 462, 479; *Hammerschmidt* v. *United States*, 265 U.S. 182. Numerous cases in this Court and the courts of appeals involving the conspiracy-to-defraud provision reveal that the offense clearly includes an agreement to seek, by means of a false representation, a benefit from the government which would not be conferred if a truth-

[2] Petitioners also rely on *United States* v. *Grainger*, 346 U.S. 235, decided the same day as *Bridges*, in which the Court applied its interpretation of the Suspension Act to a prosecution for filing, and conspiring to file, false claims in violation of 18 U.S.C. 287. The Court found the Suspension Act applicable there because the pecuniary interests of the government were affected. Like *Bridges*, *Grainger* has no bearing on the case at bar.

ful representation were made.[3] Such an offense was concededly charged in the present indictment.

The conspiracy-to-defraud statute protects the government's legitimate interest in having its laws operate according to their tenor, on the basis of truthful, rather than falsified, information. Interference with this interest, as was charged here, is the gist of the "fraud", as that term is used in Section 371.[4] Contrary to petitioners' suggestion (Pet. 9), it is immaterial that Congress refused to permit the validity of the non-Communist affidavits—required of all union officers seeking the services of the NLRB—to be challenged before the Board[5] (*Leedom* v. *International*

[3] See, *e.g.*, *Lutwak* v. *United States*, 344 U.S. 604 (decided the same term as *Bridges*); *Nye & Nissen* v. *United States*, 336 U.S. 613; *Fiswick* v. *United States*, 329 U.S. 211, 213; *United States* v. *Walter*, 263 U.S. 15; *Hyde* v. *United States*, 225 U.S. 347; *United States* v. *Keitel*, 211 U.S. 370, 392; *Heald* v. *United States*, 175 F. 2d 878, 880 (C.A. 10), certiorari denied, 338 U.S. 859; *Berenbeim* v. *United States*, 164 F. 2d 679, 682-683 (C.A. 10), certiorari denied, 333 U.S. 827; *Joyce* v. *United States*, 153 F. 2d 364 (C.A. 8), certiorari denied, 328 U.S. 860; *Hills* v. *United States*, 97 F. 2d 710, 713 (C.A. 9); *Curley* v. *United States*, 130 Fed. 1 (C.A. 1), certiorari denied, 195 U.S. 628; cf. *United States* v. *Lepowitch*, 318 U.S. 702, 704, construing "intent to defraud" in former 18 U.S.C. 76 (now 18 U.S.C. 912), as requiring not "more than that the defendants have * * * sought to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct."

[4] "If falsehood had been made to take the place of facts in connection with a lawful function of government, then enough 'fraud' existed to qualify as the unlawful object of a conspiracy." Goldstein, *Conspiracy To Defraud the United States*, 68 Yale L.J. 405, 422 (1959); see *Hyde* v. *Schine*, 199 U.S. 62, 82-83; *United States* v. *Cohn*, 270 U.S. 339, 346.

[5] The reason for this refusal was to obviate the infinite delays in Board proceedings which Congress feared might otherwise occur (352 U.S. at 150).

Union of Mine, Mill & Smelter Workers, 352 U.S. 145; *Amalgamated Meat Cutters* v. *National Labor Relations Board*, 352 U.S. 153). Congress' exclusive reliance on criminal sanctions to enforce Section 9(h) in no way mitigates either the falsity of the affidavits involved in this case or their use fraudulently to obtain NLRB services which Congress intended to be withheld.

2. Petitioners contend (Pet. 11–12) that their convictions for violating 18 U.S.C. 371 by conspiring fraudulently to obtain the services of the NLRB should be reversed on the ground that Section 9(h) of the Labor Management Relations Act, held valid by this Court in 1950 (*American Communications Assn.* v. *Douds*, 339 U.S. 382) and repealed in 1959 (73 Stat. 525), is unconstitutional.[8] But there is no reason to reconsider the constitutional question here, for petitioners would not be entitled to a reversal of their convictions even if—contrary to the holding in *Douds*—Section 9(h) were invalid. "The courts have consistently held that the unconstitutionality of the operation or proceeding in relation to which a deception was practiced is not a defense in a prosecution for such deception. As long as a department or agency has colorable authority to do what it is doing, the constitutionality of the statute or order granting the

[8] Petitioners do not specify the constitutional provisions with which Section 9(h) is claimed to conflict, but it appears that they are relying on the bill-of-attainder clause (Article I, Section 9) and the Fifth Amendment. In addition, the *amici* urge that the provision violates the First Amendment, as an interference with "freedom of association" (*Amici's Brief*, p. 9).

authority in the first place is immaterial." *United States* v. *Meyer*, 140 F. 2d 652, 655 (C.A. 2). Thus in *United States* v. *Kapp*, 302 U.S. 214, the district court had dismissed an indictment for conspiracy to defraud the United States by making false representations to secure benefits under the Agricultural Adjustment Act, on the ground that that Act had been held unconstitutional in *United States* v. *Butler*, 297 U.S. 1. In reversing that decision, this Court stated (302 U.S. at 217–218):

> Such a construction is inadmissible. It might as well be said that one could embezzle moneys in the United States Treasury with impunity if it turns out that they were collected in the course of invalid transactions. * * * Appellees were not indicted for a conspiracy to violate the Agricultural Adjustment Act but for a conspiracy to violate the statute protecting the United States against frauds. It is cheating the Government at which the statute aims and Congress was entitled to protect the Government against those who would swindle it regardless of questions of constitutional authority as to the operations that the Government is conducting. * * *

Similarly, in *Kay* v. *United States*, 303 U.S. 1, the petitioner sought to attack his conviction of making false statements to influence the action of the Home Owners Loan Corporation, in violation of 12 U.S.C. 1467(e), on the ground that the Home Owners Loan Act of 1933 was unconstitutional. Relying on *Kapp*, the Court held that "[t]here is no occasion to consider this broad question as petitioner is not entitled to

raise it. When one undertakes to cheat the Government or to mislead its officers, or those acting under its authority, by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction" (303 U.S. at 6). See, also, *Carter* v. *Texas*, 305 U.S. 557, dismissing appeal from 135 Tex. Crim. Rep. 457, 116 S.W. 2d 371; *Ogden* v. *United States*, 303 F. 2d 724, 731 (C.A. 9); *Humble Oil & Refining Co.* v. *United States*, 198 F. 2d 753, 756 (C.A. 10), certiorari denied, 344 U.S. 909; *United States* v. *Barra*, 149 F. 2d 489, 490 (C.A. 2); *Boehm* v. *United States*, 123 F. 2d 791 (C.A. 8), certiorari denied, 315 U.S. 800; *Hills* v. *United States*, 97 F. 2d 710, 713, (C.A. 9); cf. *United States* v. *Williams*, 341 U.S. 58, 67–69.

The principle applied in these cases, we submit, is equally applicable here. Indeed, this case is stronger than any of the cited cases, for if the defendants in *Kapp* were precluded from relying on the invalidity of a statute *which this Court had previously held unconstitutional*, surely the present petitioners may not overturn their convictions by attacking a statute which this Court has previously upheld. Falsification and trickery—like force or violence—are not legitimate means of testing the constitutionality of a statute. Quite apart from the validity of any particular legislation, there is an overriding interest in preventing the use of deceit to undermine the government's operations or circumvent its laws. Of course, affected persons are entitled to question the validity of acts of Congress, but their attacks must be made in an orderly

fashion and in accordance with law. Petitioners might have laid a foundation for a challenge to Section 9(h) in this case by filing true affidavits; instead, they sought to thwart the provision and frustrate its purposes by fraudulent means. Such practices should not be condoned, especially where, as here, the statute at which they were directed had been upheld—after a legal and orderly challenge—by this Court.

Although the validity of Section 9(h) is not a proper issue in this case, we briefly point out that, contrary to petitioners' contention, neither *United States* v. *Brown*, 381 U.S. 437, nor *Aptheker* v. *Secretary of State*, 378 U.S. 500, overrules the decision in *Douds*, in which Section 9(h) was upheld. Unlike the statute found unconstitutionally broad in *Aptheker*, Section 9(h) neither "sweeps within its prohibition both knowing and unknowing members"[1] (378 U.S. at 510) nor excludes "other considerations which might more closely relate the [sanction] to the stated purpose of the legislation" (378 U.S. at 511).[1] And

[1] Whereas the passport provision of the Subversive Activities Control Act of 1950, Section 6, 50 U.S.C. 785, covered persons who did not know that the group to which they belonged was a Communist-action organization, Section 9(h) applies only to members of the Communist Party itself. And while the passport provision effectively prohibited all foreign travel, regardless of the purpose of any trip or the sensitivity of the area to which travel was sought, Section 9(h) is confined to a much more particularized kind of conduct. Neither union membership nor employment in other than sensitive positions of union leadership is affected. Moreover, considering the manner in which union officers are chosen, in contrast with the way passports are granted, there was no less restrictive means for Congress to effect the concededly legitimate purpose of Section 9(h).

this Court expressly distinguished *Douds* in the *Brown* case on the ground that the statute involved there, "unlike § 9(h), disqualifies from the holding of union office not only present members of the Communist Party, but also anyone who has within the past five years been a member of the Party" (381 U.S. at 458). See also *Communist Party of the United States* v. *Subversive Activities Control Board*, 367 U.S. 1, 86–87.

3. Petitioners also present a number of contentions relating to alleged errors at their trial. All of these were, we submit, fully considered and properly rejected by the court of appeals, and none warrants further review by this Court.

a. Petitioners first attack the trial court's denial of their motion for the production, or *in camera* inspection, of the minutes of the grand jury testimony of three government witnesses (Pet. 12–16). But as this Court recently held in *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400, defendants are entitled to the production of grand jury testimony only when they have shown that "'a particularized need' exists for the minutes which outweighs the policy of secrecy." Whether a particularized need has been shown depends upon the nature of the charge, the nature and significance of the witness' trial testimony, the existence of pretrial statements available to defense counsel—in short, on whether an appraisal of the witness' testimony within the framework of the entire case indicates that further probing of the direct testimony is necessary. Cf. *United States* v. *Boyance*, 329 F. 2d 372, 377 (C.A. 3), certiorari denied *sub*

nom. Feldman v. *United States*, 377 U.S. 965; *Gordan* v. *United States*, 299 F. 2d 117 (C.A. D.C.); *Travis* v. *United States*, 269 F. 2d 928, 945 (C.A. 10), reversed on other grounds, 364 U.S. 631. As petitioners appear to concede (see Pet. 14), no such need was shown in this case. As the court of appeals correctly pointed out, "the witnesses were thoroughly and competently cross-examined on numerous other judicial and extra-judicial statements without manifest inconsistency * * *" (Pet. App. 13a).

It is implicit in *Pittsburgh Plate Glass Co.* (see 360 U.S. at 398) that where, as here, no particularized need for the grand jury testimony of a witness is shown, the trial judge is not required to examine the testimony merely to determine whether there might be some inconsistency with the witness' testimony at the trial. See, *e.g.*, *Jackson* v. *United States*, 297 F. 2d 195 (C.A. D.C.); *Parr* v. *United States*, 265 F. 2d 894 (C.A. 5), reversed on other grounds, 363 U.S. 370; *Hance* v. *United States*, 299 F. 2d 389, 398 (C.A. 8); *Bary* v. *United States*, 292 F. 2d 53 (C.A. 10). While *in camera* examinations of grand jury testimony are made upon request as a matter of course in the Second Circuit (*e.g.*, *United States* v. *Giampa*, 290 F. 2d 83, 85), that variation from the practice in the other circuits has not been deemed by this Court a matter requiring review, where on the facts no "particularized need" for inspection was shown. *Berry* v. *United States*, 295 F. 2d 192 (C.A. 8), certiorari denied, 368 U.S. 955; *Brilliant* v. *United States*, 297 F. 2d 385 (C.A. 8), certiorari denied, 369 U.S. 871; *United States* v. *Boyance*, 329 F. 2d 372 (C.A. 3),

certiorari denied *sub nom. Feldman* v. *United States*, 377 U.S. 965; *United States* v. *Bertucci*, 333 F. 2d 292 (C.A. 3), certiorari denied *sub nom. Doherty* v. *United States*, 379 U.S. 839. There is similarly no occasion for review in this case.

b. Petitioners also seek review of various rulings of the trial court, sustained by the court of appeals, relating to the admission of evidence at the trial (Pet. 16–20, 24–28). For the most part, their contentions call for an evaluation of the trial court's exercise of discretion in light of the record as a whole. The court below undertook this evaluation and correctly, we submit, found no error prejudicial to petitioners' substantial rights.[8]

Petitioners complain of the exclusion of two "business records": petitioner Dichter's expense vouchers, offered to impeach witness Locke's testimony that Dichter took over the management of Mine-Mill's Cleveland office after the ouster of Eckert and had staff meetings "nearly every morning" during April and May of 1948,[9] and a list compiled by the NLRB

[8] It should be noted that the court below reversed petitioners' original convictions solely because of the introduction of inadmissible evidence (Pet. App. 28a). There is no reason to believe that petitioners' contentions were not adequately considered below.

[9] The vouchers offered by petitioners showed that Dichter was in Cleveland on April 8, 1948, and thus supported the significant part of Locke's testimony that Dichter participated with petitioner Travis and Party functionaries who did not belong to Mine-Mill in expelling Eckert from union leadership because of Eckert's urging—contrary to the position of the Communist Party at that time—that Mine-Mill officers comply with Section 9(h) (R. 74–77).

showing when various labor unions first complied with Section 9(h). Exclusion of the vouchers, which related only to a collateral matter (see Wigmore, *Evidence*, (3d ed.) §§ 1001–1003, 1021), and of the proffered list, the relevance of which was not adequately established,[10] plainly did not prejudice the defense.

Petitioners also contend that the court erroneously permitted the testimony given at the first trial by William Mason, who died before the second trial (R. 129–130), to be read to the jury under the procedure approved by this Court in *Mattox* v. *United States*, 156 U.S. 237. Petitioners assert that they did not have a full opportunity to cross-examine Mason at the first trial because of the allegedly improper withholding of certain "statements", restrictions on cross-examination, and the failure of the Court to give petitioners access to Mason's grand jury testimony.[11]

As this Court has made clear, "[f]inal decision as to production [of statements under 18 U.S.C. 3500] must rest, as it does so very often in procedural and evidentiary matters, within the good sense and experience of the District Judge * * * subject to the appropriately limited review of appellate courts." *Palermo* v. *United States*, 360 U.S. 343, 353. The trial court's findings as to whether particular documents are "statements" pre-

[10] The list showed only that 108 unions filed affidavits in 1947, 73 in 1948, 30 in 1949, and 29 in 1950. There was no showing that any of these unions were, as petitioners now assert (Pet. 20), "similarly situated" with Mine-Mill. Why any of the listed unions filed affidavits when they did is purely a matter of conjecture, and the exhibit offered by petitioners was wholly devoid of probative value.

[11] The latter contention is discussed *supra*, at pp. 14–16.

ducible under the Jencks Act may not be disturbed unless "clearly erroneous." *Campbell* v. *United States*, 373 U.S. 487, 493. In this case, both the trial court and the court of appeals found that all of Mason's producible "statements" had been delivered to the defense at the first trial and that the additional documents sought by petitioners at the second trial were not "statements" within the meaning of Section 3500.

These findings were arrived at after careful consideration of the available evidence and are fully supported in the record. Contrary to petitioners' representation (Pet. 28), the trial court and counsel conducted a thorough *voir dire* examination of the F.B.I. agent (R. 140–148) and several government attorneys who had interviewed Mason. These examinations revealed that, except for those documents which were in fact produced, the only notes taken by the interviewers were selective, abbreviated and incomplete, and the memoranda involved were prepared both from the notes and the interviewers' memory—usually a relatively long time after the interview. Contrary to petitioners' assertions (Pet. 27), the evidence as to the only two documents specifically mentioned in the petition plainly indicates that they were not producible under Section 3500. Worthington's memorandum was prepared, a month after his interview with Mason, on the basis of interview notes as well as Worthington's recollections. Neither the interview notes nor the memorandum was a substantially verbatim account of Mason's testimony and neither

was shown to Mason or approved by him in any way (R. 182–191, 214–216). Nor was Crandall's outline "checked over" with Mason, or even shown to him. Indeed, it was prepared—from the transcript of Mason's testimony in another trial—*before* Crandall's interview with Mason (R. 173, 180, 182, 215). The only interviewer not examined on *voir dire* at the second trial was an NLRB attorney, stationed in Washington, who had interviewed Mason in 1954 preparatory to an NLRB hearing. But the trial court found that the government made a satisfactory showing that this interview did not result in any producible statement other than the affidavit which, contrary to petitioners' allegation (Pet. 26), was made available to the defense at the first trial (R. 216; see also R. 210–211).

Of course Mason could not have been examined on *voir dire* at the second trial. But the critical factor under the *Mattox* rule is whether there was opportunity for such an examination at the first trial. Plainly there was such an opportunity. Having failed to avail themselves of it then, petitioners may not now claim prejudice. See *Ogden* v. *United States*, 303 F. 2d 724 (C.A. 9). It should be noted that petitioners' counsel had examined Mason on *voir dire* on the subject of pretrial statements at the trial of a related case involving petitioner Travis (R. 149–150).[12]

[12] Petitioners' contention that they were unduly restricted in cross-examining Mason at the first trial is without merit. They complain of not being allowed to impeach his "general credibility by showing that he, as a naturalized citizen and admitted ex-Communist, feared denaturalization and deportation and was therefore susceptible to pressures or suggestions that he give

c. Petitioners raise objections to the portion of the trial court's charge relating to co-conspirators' declarations (Pet. 20–23). The trial court gave the standard instructions on this matter (see Mathes, *Some Suggested Forms for Use in Criminal Cases*, 20 F.R.D. 231, 269–270 [Form 43C–3]), which, as the court below held (Pet. App. 8a–10a), fully informed the jurors as to the proper manner in which to consider such declarations.[13] The court properly rejected petitioners' request that it specify which declarations were, in fact, in furtherance of the conspiracy (R. 667, 1030–1031). To comply with this request, the court would have had to determine not only whether each statement was made during the pendency of the conspiracy,[14] but whether it was made with the intent

testimony favorable to the government" (Pet. 27). This same contention was raised and rejected by the court of appeals in *Travis* v. *United States*, 269 F. 2d 928, 939–940 (C.A. 10), reversed on other grounds, 364 U.S. 631. There the court correctly found that the attempted line of cross-examination was not geared to a reasonable showing of bias or undue influence. Particularly in light of the evidence that Mason had admitted his past Communist affiliations to the Immigration and Naturalization Service prior to his naturalization, the court aptly observed: "The inference that the witness Mason was coercively influenced to testify by a power over him held by immigration officials requires imagination to be applied in disparagement of facts appearing in the record". For a full view of the facts as to Mason's cross-examination, see the record in this Court in Nos. 3, 10 and 71, 1960 Term, pp. 737–744, and the brief for the United States in that case, pp. 61–64.

[13] The correctness of this instruction—set forth at R. 1013—is borne out by a long line of decisions in this Court. See Annotation, 1 L. Ed. 2d 1780, 1782 n. 20.

[14] The jury was carefully instructed as to the dates on which the conspiracy began and ended (R. 1008, 1012, 1024), and

to advance the conspiracy's objects. See *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 985 (1959). The determination of intent is peculiarly within the jury's province.[20]

Likewise without merit is petitioners' contention (Pet. 23–24) that the trial court improperly refused to instruct as to accomplice testimony. With the possible exception of witness Lawrence, who was indicted with petitioners and pleaded *nolo contendere*, it is questionable whether any of the witnesses may properly be considered petitioners' "accomplice". In any event, the trial court was not required explicitly to caution the jury against too much reliance upon the testimony of accomplices. See *Krulewitch* v. *United*

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there is no reason to believe that it considered declarations made before June 15, 1949, to be in furtherance of the conspiracy. There were no post-conspiracy statements offered. The decisions of this Court cited by petitioner (Pet. 22) hold only that statements made after a conspiracy has terminated are not admissible against all conspirators and are wholly inapposite here.

[20] Petitioners also allege (Pet. 22–23) that the court improperly allowed the jury to consider statements of Communist functionaries not shown to be co-conspirators as proof that the defendants were members of the conspiracy. But the cited testimony—some of which is plainly of no significance (*e.g.*, Bary, R. 239–240; Johnson, R. 447; Hillman, R. 449)—was admitted under carefully drawn limiting instructions and was not admitted to show that any defendant was a member of the conspiracy. The jury was properly instructed that "participation of a defendant in a conspiracy must be determined from evidence relating to [his] own acts, his own declarations and his own conduct in connection with the actions and conduct of others" (R. 1013; cf. 20 F.R.D. at 269). There is no reason to believe that the jury did not properly adhere to this instruction.

States, 336 U.S. 440, 454 (Jackson, J., concurring); *Caminetti* v. *United States*, 242 U.S. 470, 495. Moreover, as the court of appeals found (Pet. App. 19a-20a), the trial court's instructions (Pet. App. 20a, n. 8) adequately cautioned the jury concerning the weight they should give to the testimony of the three witnesses who petitioners claim were accomplices.[16]

Nor is there any substance in petitioners' contention (Pet. 10–11 & n. 9, 30–31 & n. 34) that the trial court omitted an essential element of the offense in its charge to the jury. This objection was not made in the trial court (see R. 1030–1035; 1118–1126) and therefore may not be considered here. Moreover, the fragment of the charge relied on by petitioners is taken out of context. The court read the full indictment to the jury, which, of course, revealed all the elements of the crime with which petitioners were charged (R. 1005–1008). In addition, after reading the text of 18 U.S.C. 371, the court expressly instructed that "[t]he conspiracy charged in this case is a conspiracy to defraud the United States or an agency thereof by filing false non-Communist affidavits with the National Labor Relations Board by one or more of the defendants in this case * * *" (R. 1010).

4. Finally, petitioners attack the sufficiency of the evidence that they were engaged in concerted, rather than merely unilateral, unlawful activities. This is-

[16] The instruction referred to "informers" and "former members of the Communist Party." Fikes was a paid informer and Gardner and Lawrence were former Party members. Gardner also had given information to the government, although it was not shown whether he was paid for it.

sue was resolved adversely to petitioners' contentions in two decisions of the district court and jury and two decisions of the court of appeals.[17] There is no occasion for further review. See *United States* v. *Johnson*, 319 U.S. 503, 518; *Delaney* v. *United States*, 263 U.S. 586.

As we have noted (Statement, *supra*, pp. 3–4), there is no dispute that petitioners were both Communist Party members and Mine-Mill officials, that their conduct as union officials in relation to Section 9(h) conformed to the policy of the Party, and that that policy changed in 1949 from one of non-compliance with Section 9(h) to "compliance" by having union officials sign non-communist affidavits, some of which were false.[18] Petitioners contend that the government merely established "parallelism" or perhaps two separate conspiracies, but there was ample evidence of concerted action by all petitioners toward the goal of the conspiracy charged in the indictment.

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[17] As the court below noted (Pet. App. 10a), the evidence in both trials was substantially the same.

[18] Four petitioners were union officers and signed affidavits during the relevant period: Dichter (first affidavit filed in February 1955; did investigatory work for the Party in March 1955, R. 577); Dennis (filed affidavits from 1949 to 1956; did various jobs for the Party during that period, R. 551–554, 556–557, 559–560); Travis (filed affidavits between 1949 and 1954; before and during that time he was concededly a member of the Communist Party, R. 306–309, 317–318, 558); and Wilson (filed affidavits from 1949 through 1953; before and during that time he indicated that his "compliance" with Section 9(h) was feigned and he helped another union official who was a Party member similarly to feign resignation from the Party before filing an affidavit, R. 431–434, 438, 469, 475).

"Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances.'" *Glasser* v. *United States*, 315 U.S. 60, 80; *United States* v. *Manton*, 107 F. 2d 834, 839 (C.A. 2), certiorari denied, 309 U.S. 664. Here, the jury had evidence of a prolonged course of conduct by petitioners and others to maintain Communist Party control of Mine-Mill. When Communist control was jeopardized by Section 9(h), a decision was taken by the Party leadership to continue this control by means of fraudulent "compliance" with the Act. It was necessary to the effectuation of this policy that all, or at least most, of Mine-Mill's Communist officers file false affidavits. And in fact—with a uniformity that cannot be attributed to coincidence in light of this background—Mine-Mill's Communist officers, including four petitioners, signed false affidavits, subjecting themselves to the risk of criminal prosecution.

The evidence showed continuing contacts among the petitioners and petitioners' continuing relationship to both Mine-Mill and the Communist Party. Petitioners repeatedly subjected themselves to Party discipline (*e.g.*, Travis, R. 558, 573; Wilson, R. 320, 441, 562) and sought, often successfully, to impose such discipline on others (*e.g.*, Travis, Dichter, Dennis, R. 77, 81; Skinner, Dichter, Sanderson, Travis, R. 569, 572, 577–578). The evidence established that all were intimately involved with the threat posed by Section 9(h) to Communist domination of Mine-Mill and that all were aware of, and contributed to the effectuation of, the

policy adopted in response to that threat.[19] As the court below correctly ruled, there was more than sufficient "competent and substantial evidence before the jury fairly tending to sustain the verdict." See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 254.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[19] The petition singles out petitioner Dichter as one against whom the evidence was particularly insufficient (Pet. 31). But Dichter's role in translating Party policy on Section 9(h) into union policy was far from insignificant (See R. 77–79, 236–237, 251–254). Even if he had not joined the conspiracy until he became a union officer and filed a false affidavit in 1955 (see n. 18, *supra*), he would still properly have been chargeable as a co-conspirator with the other petitioners. See *Mendelson* v. *United States*, 58 F. 2d 532 (C.A.D.C.). The cases cited by petitioners (Pet. 31) in no way support the proposition they are claimed to espouse. Indeed, they all expressly recognize that "[a] single act may be enough to draw a defendant within the ambit of a conspiracy." *United States* v. *Bentvena*, 319 F. 2d 916, 927 (C.A. 2). There was ample evidence to show that Dichter—like all the other petitioners—worked for the maintenance of Communist control over Mine-Mill, a goal which logically required, and in fact was pursued by, concerted efforts fraudulently to obtain the services of the NLRB.

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